No. 93-744

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

GREENWICH COLLIERIES, *et al.*,

Respondents.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

MAHER TERMINALS, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF THE NATIONAL COAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE NATIONAL COAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This Court has granted certiorari to consider the decision of the Third Circuit Court of Appeals declaring invalid a "true doubt" rule advocated by the Department

of Labor ("DOL") to allow administrative law judges ("ALJs") to find facts that are not supported by the weight of the evidence. The National Coal Association ("NCA") and its members believe that the lower court was correct in striking down the "true doubt" rule and submit this brief in support of the respondents.

INTEREST OF AMICUS[1]

NCA is a trade association representing coal mine operators who produce sixty-five percent of the nation's coal. NCA's membership includes operating coal mining companies of all sizes, as well as coal brokers, equipment suppliers, coal transporters, consultants, electric utilities and resource developers.

NCA producer members, and all other U.S. coal producers, are responsible for the payment of benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, in two ways: (1) as individual coal mine operator defendants,[2] 30 U.S.C. §§ 932-933; or (2) as mandatory payors of a producers' tax into the Black Lung Disability Trust Fund

[1] Pursuant to Rule 37.3, written consent form counsel of record for all parties to this proceeding are being filed with the Clerk of this Court with this Brief.

[2] Coal operators must secure federal black lung compensation liability by purchasing workers' compensation insurance or by qualifying as a self-insurer. 30 U.S.C. § 933. Both the self-insurance and purchased insurance arrangements involve intricate financial planning by the coal operator. This planning is based on the number of claims as a percentage of payroll and the expected approval rate.

("Trust Fund"), 26 U.S.C. § 4121. Revenues collected for the Trust Fund are used to pay compensation awards in cases in which the miner's employment ended before January 1, 1970, or where an individual responsible coal mine operator cannot be identified or is uninsured. 30 U.S.C. § 934, 26 U.S.C. § 9501(d)(2), 9501(d)(1)(B). The Trust Fund also pays all administrative expenses of the Departments of Labor, Treasury, and Health and Human Services, which operate the black lung program. 26 U.S.C. § 9501(a)(2), 9501(d)(5). If the Trust Fund is unable to meet its obligations with the funds generated by the producers' tax on coal, it borrows money from the U.S. Treasury, which must be repaid with interest. 26 U.S.C. § 9501(c), (d)(4).

The tax paid by coal producers into the Trust Fund, augmented by two tax increases, currently is set at $1.10 per ton on underground-mined coal and $.55 per ton on surface-extracted coal. 26 U.S.C. § 4121(a), (b). As of 1990, the Trust Fund had collected over $5.66 billion in tonnage taxes from coal producers but had paid out over $8.64 billion in compensation.[3] In order to meet the shortfall between compensation levels and Trust Fund revenues, by September 1993, the Trust Fund owed the U.S. Treasury more than $3.6 billion.[4] To relieve pressure on the Trust Fund, Congress passed a five-year moratorium on

[3] Brief of the National Coal Association as Amicus Curiae in Support of Petitioners at 4, *Pauley v. BethEnergy Mines, Inc.*, 111 S. Ct. 2524 (1991) (Nos. 89-1714, 90-113 and 90-114).

[4] U. S. Dept of Labor, Employment Standards Admin., *OWCP Annual Report to Congress FY 1992* 17 (1993) (*"1992 Annual Report"*).

interest accruals on the indebtedness of the Trust Fund in 1985. The moratorium ended September 30, 1990.[5] The interest on the debt is again accruing. In fiscal year 1992, the additional interest on the debt was $366,615,681.18.[6]

From time to time, NCA represents the interests of its members in litigation of importance to the mining industry. The matters presented here to this Court are of particular importance. In the early 1980s, NCA, together with all other groups having an interest in preserving a viable black lung compensation program, worked for over two years to avert impending financial collapse of the program. The products of this effort were the Black Lung Benefits Revenue Act of 1981 and the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-110, 95 Stat. 1635 (1981).

Today, DOL's active advocacy of a "true doubt" burden-shifting rule, applicable to all entitlement facts that need to be decided in black lung claims, violates both the letter and the spirit of the 1981 legislative effort. The court below was correct in restraining DOL's departure from the 1981 agreement. This Court should do the same.

SUMMARY OF ARGUMENT

The traditional standard of proof in civil litigation is the fair preponderance of the evidence. DOL asks this

[5] Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(b), 100 Stat. 312 (1986).

[6] Facsimile from James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dep't of Labor, Washington, D.C. (March 22, 1994).

Court to permit ALJs to depart from this traditional standard of proof. DOL requests the Court to defer to its enactment of what is, in effect, a standard that requires the party defending a black lung claim to prove a claimant's non-entitlement by clear and convincing evidence or proof beyond a doubt.

DOL's justification for this departure is not readily identifiable. It does not rest on the plain language of the statute. The Black Lung Act contains no "true doubt" rule or any facsimile of it. It does not rest on a fair reading of DOL's regulations. Like the Act itself, DOL's regulations contain no "true doubt" rule. Although DOL's rules showcase the remedial intent of the Act and provide that ALJs "shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure," DOL's regulations do not exempt ALJs from applying the traditional notions of proof. Indeed, "[n]o amount of informality can alter the elementary requirement that the claimant allege and prove the substance of all essential elements in his case." A. Larson, 2B *The Law of Workmens' Compensation*, § 77A.44 (1993). Finally, DOL's justification for the rule does not rest on a fair or natural reading of the Administrative Procedure Act ("APA"), for it is well-established that under the APA, the party seeking a rule or order bears the burden of proving its case by a preponderance of the evidence.

Similarly, DOL's advocacy of a "true doubt" rule finds no justification in this Court's case law. These are not the types of cases in which this Court has upheld allocating the risk of error in other than roughly equal fashion. A black lung claimant's interest in securing benefits is substantial; but interests equally as substantial are

customarily adjudicated in civil proceedings under a preponderance of the evidence standard. The reason for this is plain. The preponderance standard insures that an adjudication rests on the most likely and probable view of the facts.

The scheme DOL advocates invites error in the administrative process and it is fundamentally unfair.

ARGUMENT

A. THE TRUE DOUBT RULE IS NOT CONSISTENT WITH THIS COURT'S DECISION IN *MULLINS COAL*

Seven years ago, DOL and several coal operators petitioned this Court for relief from a decision by the U.S. Court of Appeals for the Fourth Circuit holding that a fact was proved merely by the presence of a single item of evidence favorable to a black lung claimant. At issue was a powerful "interim presumption" found in the Black Lung Benefits Act and DOL's regulations that presumed a claimant's entitlement to benefits when the evidence "established" certain specified "invocation facts." The party opposing entitlement could rebut the presumption by proving the ultimate facts – that the miner was working or able to work, that the miner did not have pneumoconiosis, or that he or she was not totally disabled due to the disease. 20 C.F.R. § 727.203 (1993).

At that time, DOL argued that it was its longstanding practice to require black lung claimants to establish invocation facts by a preponderance of the evidence. Brief for

the Federal Respondent at 14-15, 18, 36, *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135 (1987). Similarly, according to DOL, the party opposing entitlement met its "parallel obligation" to "establish" its case "only by proving [a rebuttal fact] by a preponderance of the evidence," a view uniformly adopted by the courts of appeals at DOL's urging. *Id.* at 19 n.17. Hundreds of thousands of black lung claims had been adjudicated in that manner and, according to DOL, its regulations required such a practice. DOL also argued that requiring claimant to "establish" basic entitlement facts by a preponderance was in accord with the APA, adding further evidence of the reasonableness of its position. *Id.* at 15-16. 34.

The industry petitioners and NCA agreed with DOL on these points, and argued to the Court that the "single-item invocation rule" was inconsistent with agency practice, historic DOL interpretation, and the APA's requirement in section 7(c). That requirement states that the "proponent" of any agency rule bear the burden of proof which must "be . . . supported by and in accordance with the reliable, probative, and substantial evidence." It also states that a party is entitled to cross-examination as may be required "for a full and true disclosure of the facts."

This Court agreed. In *Mullins Coal*, the Court deferred to DOL's interpretation of its regulation and held that in order to "establish" an invocation fact, claimant must prove that fact by a preponderance of the evidence. *Mullins Coal*, 484 U.S. at 148-49, 159, 161 n.35.

In *Mullins Coal*, however, DOL argued that there was an "exception" to the APA's preponderance rule – the

"true doubt" rule. Under the "true doubt" rule, a preponderance does not mean a preponderance. It means, hypothetically, evidence that is equally probative but contradictory. According to DOL, where the claimant (but not the party opposing entitlement) bears the burden of proving a fact, a tie in the proof is good enough to "establish" that fact. This exception was not addressed by the Court in *Mullins Coal*, because it was not applied in the cases before the Court and was only rarely applied generally.[7]

Now DOL asks this Court to hold that the exception is the rule not only for cases subject to the interim presumption, but for all cases.

B. THE TRUE DOUBT RULE IS NOT EMBODIED IN DOL'S REGULATIONS

Since the inception of the black lung program in 1969, Congress consistently has recognized the competing policies of compensation to eligible miners, affordability to the industry, and procedural fairness to defendants as well as claimants. Coal industry representatives participated in this legislative debate involving the program.[8] As with all complex legislation, compromises had to be

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[7] Although there is no empirical data to support the industry's perception because a very small percentage of black lung opinions are published, many in the industry believe that the use of the true doubt rule has increased significantly between the mid 1980s and the early 1990s.

[8] *Problems relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 139 (1981) (statement of Carl E. Bagge, President, NCA).

forged and for the black lung program, the liberality of the program was balanced by its procedural safeguards and Congress's promise that costs would be affordable.

DOL's administration of the black lung program achieved the liberal goals that Congress sought. More than 100,000 claims were approved under the interim presumption.[9] At the same time, however, the program had outstripped reasonable attempts at benefit funding. In an effort to restore financial solvency to the Trust Fund and tighten the eligibility criteria to eliminate awards of benefits when the medical evidence was not adequate to establish total disability or death due to black lung disease,[10] Congress ordered the elimination of the interim presumption and in 1981, Congress repealed many of the remaining statutory presumptions and rules of proof

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[9] *1992 Annual Report* at 26 (Table 1).

[10] *See Black Lung Benefits and Revenue Amendments of 1981: Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources on S. 1922*, 97th Cong., 1st Sess. 10-11 (1981); House Comm. on Ways and Means, *Report and Recommendations of the Subcomm. on Oversight on Black Lung Disability Trust Fund*, 97th Cong., 1st Sess. 20 (1981) (reporting that the General Accounting Office had concluded that 84% of claims approved were based on medical evidence that was not adequate to establish disability or death due to black lung); Comptroller General of the United States, *Report to the Congress of the United States, Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability*, HRD 80-81 (July 28, 1980) (reporting that "in 88.5% of the cases [decided by the Social Security Administration] medical evidence was not adequate to establish disability or death from black lung.").

favorable to claimants.[11] *See generally Compton v. Inland Steel Coal Co.*, 933 F.2d 477, 483-90 (7th Cir. 1991) (Coffey, J., concurring). The eligibility criteria in effect for claims filed after January 1, 1982, set forth in 20 C.F.R. Part 718 (1993), require claimants to prove the "ultimate facts" of entitlement, *i.e.*, that the miner has black lung disease, that the disease arose out of the miner's coal mine employment, that the miner is totally disabled for performing his usual coal mine employment by a respiratory or pulmonary impairment, and that the miner's total disability or death is "due to" pneumoconiosis. 20 C.F.R. §§ 718.202-718.205.

Like DOL's interim presumption, the Part 718 rules do not contain any "true doubt" rule. Section 718.3 provides that although the Act intends to give claimant "the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis," it also states that "no claim shall be approved unless the record considered as a whole, in light of any applicable presumptions, provides a reasonable basis for determining that the criteria for eligibility under the Act and this part have been met." 20 C.F.R. § 718.3(c). Section 718.403 then provides that "[e]xcept as provided in this subchapter, the burden of proving a fact alleged in connection with any provision of this part shall rest with the party making such allegation." 20 C.F.R. § 718.403. *See also* 20 C.F.R. § 718.307(b). No fair reading of these regulations divulges a "true doubt" rule.

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[11] Black Lung Benefits Revenue Act of 1981, and Black Lung Benefits Amendments of 1981, Pub. L. 97-119, 95 Stat. 1635 (1981).

C. EVEN THE COURTS APPROVING THE TRUE DOUBT RULE DO NOT AGREE WITH DOL'S SCHEME

The courts of appeals do not agree on the source of DOL's rule or how it applies. DOL does not necessarily agree with the courts of appeals' formulations either. For example, the Seventh Circuit (followed by the Sixth) found the "true doubt" rule to be a creature of judicial construct. *Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs*, 988 F.2d 706, *reh'g denied*, 999 F.2d 291 (7th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3429 (U.S. Dec. 10, 1993) (No. 93-935); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228 (6th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3429 (U.S. Dec. 17, 1993) (No. 93-964). DOL specifically denounces the Seventh Circuit's formulation of the rule.[12] The Seventh Circuit admitted that "[w]ere it not for the true doubt rule, Jones might have failed to invoke the presumption of disability [20 C.F.R. § 727.203(a)(1)], . . . The true doubt rule revived Jones's claim by giving his evidence the benefit of the evidentiary doubt." According to the Seventh Circuit, the burden then shifts to the employer to persuade the ALJ that Jones did not have pneumoconiosis under section 727.203(b)(4). 988 F.2d at 710. This is not the way DOL argued it should work in *Mullins Coal*. There DOL said that if a claimant invokes a presumption under

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[12] DOL also takes issue with the Sixth Circuit's construction of DOL's regulations because the Sixth Circuit decided that section 718.403 does in fact allocate the burden of persuasion to the claimant. *Skukan*, 993 F.2d at 1238, 1239; Brief for the Petitioner at 30 n.17.

section 727.203(a)(1), the employer may not rebut that presumption under section 727.203(b)(4). Brief for the Federal Respondent at 24 & n.22, *Mullins Coal*, 484 U.S. 135.[13]

DOL also cites a recent decision of the Fourth Circuit to support its view that "the courts have all applied the 'true doubt' rule developed under the LHWCA to BLBA cases," citing *Greer v. Director, Office of Workers' Compensation Programs*, 940 F.2d 88 (4th Cir. 1991). Brief for the Petitioner at 27 & n.14. The court in *Greer* did not rely on any Longshore precedent to justify its use of the rule; it relied on this Court's decision in *Mullins Coal*. *Greer*, 940 F.2d at 90 n.3. The Fourth Circuit later confessed error in its reliance on *Mullins Coal* as the origin of the rule; it noted that the rule was "conceived" by the Benefits Review Board in 1978. *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 n.3 (4th Cir. 1993). Notwithstanding its decision to embrace the true doubt rule in the past in cases like *Greer*, the Fourth Circuit also noted that it had not been faced with a challenge to the rule under the APA. *Grizzle*, 994 F.2d at 1098 n.7.

With the exception of the cases here and the two pending on petitions for certiorari,[14] no court, either in a black lung claim or a claim under the Longshore Act has

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[13] Under this formulation, the constitutional concern that lurked beneath the surface in *Mullins Coal*, that there be "some rational connection between the fact proved and the ultimate fact presumed," rises to the surface. *Mullins Coal*, 484 U.S. at 159 n.32, quoting *Mobile J., & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910).

[14] *Freeman United Coal Mining*, 988 F.2d 706; *Skukan*, 993 F.2d 1228.

validated the true doubt rule in the face of an APA challenge. No court has accepted DOL's "true doubt" rule based on its presence in the Longshore Act or the Black Lung Act. No court has accepted DOL's "true doubt" rule because it found it in DOL's regulations. No court has embraced the rule by virtue of its alleged longstanding history. Nor does DOL's scheme withstand scrutiny at any level. DOL's argument in support of the rule is riddled with inconsistencies. The only thing that is clear about the rule is that in practice, it deprives the party opposing a claim of the right to insist on credible proof of its liability for benefits.

D. DOL'S TRUE DOUBT RULE IS NEITHER WORKABLE NOR FAIR

The Department of Labor argues that whether considered under Part 727 or Part 718, a claimant is required only to produce sufficient evidence to support an award of benefits. Then, according to DOL, the burden shifts to the employer to produce evidence disproving claimant's eligibility. The "true doubt" rule comes into play only after the claimant has met his or her burden and the employer has introduced "equally (but no more) probative evidence contesting eligibility." Brief for the Petitioner at 29-30 n.16. If employer produces evidence that is more probative, the "true doubt" rule does not apply, or so DOL alleges.[15] DOL also suggests, at least in this Court, that the rule should only rarely be used.

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[15] DOL suggests mine operators have an adequate opportunity to defend claims based on the fact that even with a "true doubt" rule, the approval rate for black lung claims in recent

In practice, DOL's burden allocation scheme does not work the way DOL suggests. ALJs do not agree on what standard applies to determine whether claimant has met his or her burden and ALJs do not resort to the rule as a "last resort." A survey of ALJ decisions shows that, in practice, the only consistency in the application of the notion that "true doubt" should be resolved in claimants' favor is its inconsistency. The rule comes into play in a host of contexts or not at all depending, it seems, more on the preferences of the ALJ than any other factor. For example, ALJs have resolved conflicts in the evidence in favor of claimants based on "true doubt,"[16] "reasonable doubt,"[17] "all doubt,"[18]

years has been approximately seven percent. Brief for the Petitioner at 33 n.19. The figure cited by the petitioner refers to approvals of claims filed after January 1, 1982, subject to 20 C.F.R. Part 718. The overall approval rate for all black lung claims is 47.9 percent. *1992 Annual Report* at 26 (Table 1).

[16] *McLone v. Maiden Mining, Inc.*, 16 Black Lung Rep. (MB) 3-717, 3-721 (ALJ 1992); *Smith v. Peabody Coal Co.*, 16 Black Lung Rep. (MB) 3-622, 3-628 (ALJ 1992) (in the context of the irrebuttable presumption under 20 C.F.R. § 718.304); *Sanson v. Director*, 16 Black Lung Rep. (MB) 3-183, 3-189 (ALJ 1992); *Sutherland v. Clinchfield Coal Co.*, 14 Black Lung Rep. (MB) 3-862, 3-865 (ALJ 1991); *Matthews v. Quinland Coals, Inc.*, 14 Black Lung Rep. (MB) 3-117, 3-119 (ALJ 1990).

[17] *Kennedy v. Shannon Pocahontas Mining Co.*, 16 Black Lung Rep. (MB) 3-942, 3-947 (ALJ 1992); *Griffiths v. B-D Mining Co.*, 16 Black Lung Rep. (MB) 3-673, 3-682 (ALJ 1992); *DiRienzo v. Director*, 14 Black Lung Rep. (MB) 3-849, 3-855 (ALJ 1991); *Hart v. Peabody Coal Co.*, 3 Black Lung Rep. (MB) 3-21, 3-24 (ALJ 1981).

[18] *McKeehan v. Director*, 14 Black Lung Rep. 3-524, 3-528 (ALJ 1990); *Guyer v. Director*, 3 Black Lung Rep. 3-79, 3-84 (ALJ 1981); *Fowler v. Director*, 13 Black Lung Rep. (MB) 3-389, 3-394 (ALJ 1989).

"the doubt,"[19] "sufficient doubt,"[20] "doubtful evidence,"[21] and "any doubt."[22] Others have declined to find in favor of claimant on evidence that is tied.[23] The Benefits Review Board generally affirms all but the most egregious "doubt" cases on substantial evidence grounds.

The practical effect of DOL's allocation scheme necessarily is either to permit an ALJ to find a fact on less than a preponderance or to impose upon the employer the burden of proving a fact by something more than a preponderance.[24] Under DOL's scheme, in order to defend a

[19] *Gilliam v. S. G. Coal Co., Inc.*, 15 Black Lung Rep. (MB) 3-164, 3-167 (ALJ 1991); *Cook v. Consolidation Coal Co.*, 13 Black Lung Rep. (MB) 3-601, 3-610 (ALJ 1990).

[20] *Poff v. Westmoreland Coal Co.*, 16 Black Lung Rep. (MB) 3-53, 3-60 (ALJ 1991).

[21] *Shaff v. U.S. Steel Mining Co.*, 16 Black Lung Rep. (MB) 3-612, 3-616 (ALJ 1992).

[22] *Gasperetti v. Director*, 16 Black Lung Rep. (MB) 3-956, 3-959 (ALJ 1992); *Bohr v. Director*, 14 Black Lung Rep. (MB) 3-476, 3-483 (ALJ 1990); *Jones v. Alabama By-Products*, 4 Black Lung Rep. (MB) 3-75, 3-86 (ALJ 1982).

[23] *See, e.g., Blackburn v. Director*, 14 Black Lung Rep. (MB) 3-475, 3-750 (ALJ 1990); *Roberts v. Blue Diamond Coal Co.*, 13 Black Lung Rep. (MB) 3-327, 3-335 (ALJ 1989) (holding that the "evidence is hopelessly equivocal and, as such, is insufficient to establish the existence of pneumoconiosis."); *Honeycutt v. Triple B Corp.*, 13 Black Lung Rep. (MB) 3-746, 3-756 (ALJ 1990) (holding that "the burden of proof [is] always on Claimant to establish total respiratory disability by a preponderance of the evidence.").

[24] *See, e.g., Pahira v. Blaschak Coal Co.*, 13 Black Lung Rep. (MB) 3-491, 3-494 (ALJ 1990) (where the ALJ held: "While there is a slight preponderance of negative interpretations, it is not such as to remove all doubt as to the Claimant's condition.

claim, the employer must eliminate all doubt. This is not a permissible scheme. *See Charlton v. F.T.C.*, 543 F.2d 903, 907 (D.C. Cir. 1976) (holding "[i]n American law a preponderance of the evidence is rock bottom at the factfinding level of civil litigation. Nowhere in our jurisprudence have we discerned acceptance of a standard of proof tolerating 'something less than the weight of the evidence.' ") (footnotes omitted).

A simple example is illustrative. For claims filed after January 1, 1982, no benefits are payable under the Act unless the miner has pneumoconiosis and no presumptions operate to rebuttably presume the existence of pneumoconiosis. The agency factfinder must find pneumoconiosis or is compelled to deny the claim. Traditionally, if the weight of the evidence proves that the miner has black lung disease, the fact is established. If the evidence pro and con is of equal weight, however, nothing is proven no matter which party is assigned what kind of burden. Even if the employer is assigned a burden of persuasion and musters a tie in the evidence, all that may be said is that the employer failed to prove that the miner does not have pneumoconiosis, but it does not also affirmatively prove that the miner has the disease. Where the weight of the evidence fails to prove either that the miner has or does not have pneumoconiosis, with or without the APA, the fact is not proven.

Consequently, I find that the doubt is to be resolved in Claimant's favor. I find the existence of pneumoconiosis has been established by the X-ray evidence pursuant to § 718.202.").

Under DOL's scheme, however, that failure of evidence is sufficient to establish that the miner has pneumoconiosis. Therefore, in order to defend a claim, the party opposing entitlement must do more than submit evidence which is sufficient to support a denial of benefits – such evidence would simply produce a tie. The party opposing entitlement must produce evidence which overcomes the doubt, *i.e.*, proof beyond true doubt. That is precisely what the rule on which DOL relies provides. 20 C.F.R. § 718.3 That is an allocation of risk of error that is not generally applied in the context of civil proceedings. It is "an ancient and honored aspect of our criminal justice system." *Victor v. Nebraska*, slip op. at 8, 62 U.S.L.W. 4179 (U.S. March 22, 1994) (No. 92-8894). Such a standard may not be imposed by unwritten agency interpretation, case law or snatches of legislative history showcasing the liberal intentions of the Act. *Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 636 (1983); *Pepco v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 278 n.18 (1980).

The coal industry has relied on the procedural safeguards of the APA to prevent benefit awards based on evidence that is proven unreliable or inconclusive. Seven years ago, NCA argued to this Court that the Act must be construed consistently with the APA to allow facts to be proven only on the basis of reliable, probative and substantial evidence. If the APA cannot be construed to guarantee the orderly and fair consideration of a case, even a black lung case, its application is illusory and the APA's undeniable purpose to eliminate unfairness in administrative proceedings is defeated.

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CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted,

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